

1 David J. Noonan (55966)
dnoonan@knlh.com
2 **KIRBY NOONAN LANCE & HOGE LLP**
350 Tenth Avenue, Suite 1300
3 San Diego, California 92101
Telephone: (619) 231-8666
4 Facsimile: (619) 231-9593

5 Andrew L. Colocotronis
acolocotronis@bakerdonelson.com
6 **BAKER, DONELSON, BEARMAN, CALDWELL**
BERKOWITZ, PC
7 900 South Gay Street, Suite 2200
Knoxville, Tennessee 37902
8 Telephone: (865) 549-7119
Facsimile: (865) 633-7119

9 Attorneys for Defendant Americas Collectibles
10 Network, Inc. d/b/a Jewelry Television

11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**
13

14 MARLIESE WEED, on behalf of herself and
all others similarly situated

15 Plaintiff,

16 vs.
17

18 AMERICA'S COLLECTIBLES NETWORK,
INC. d/b/a JEWELRY TELEVISION,

19
20 Defendants.
21

CASE NO. 08-CV-0925 WQH CAB

22 **AMERICA'S COLLECTIBLES**
NETWORK, INC.'S NOTICE OF, AND
PARTIAL MOTION TO DISMISS
PURSUANT TO F.R.C.P. 12 (b)(6)

23 Date: July 21, 2008
24 Time: 11:00 a.m. PDT
25 Judge: Hon. William Q. Hayes
26 Crtrm.: 4
27
28

1 **TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:**

2 **NOTICE IS HEREBY GIVEN** that on July 21 2008 at 11:00 a.m. P.D.T. or as soon
 3 thereafter as counsel may be heard in Courtroom 4 of the above-entitled Court, located at 940 Front
 4 Street, San Diego, California, 92101, Defendant America's Collectibles Network, Inc., d/b/a Jewelry
 5 Television® will and hereby does move the Court for partial dismissal of the putative Class Action
 6 Complaint on file herein pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because the
 7 Complaint fails to state claims upon which compensatory monetary relief may be granted. The
 8 Defendant seeks partial dismissal of the Complaint on the grounds that:

9 1. Plaintiff Marliese Weed seeks compensatory monetary damages pursuant to California
 10 Consumer Legal Remedies Act, Civil Code section 1750 *et seq.* ("CLRA") over the sale by Defendant
 11 of a certain gemstone, andesine labradorite. *See* Complaint, Introduction; Prayer for Relief ¶2.
 12 However, despite seeking monetary damages under the CLRA, Plaintiff failed to provide Defendant
 13 with proper written notice as required by Section 1782(a) of the CLRA of her intent to seek monetary
 14 damages thirty (30) days prior to filing her Complaint. Instead, Plaintiff provided written notice by
 15 correspondence dated May 23, 2008, the same day she filed her Complaint in this action seeking
 16 monetary damages under the CLRA. *See*, Compl. at ¶58 and referenced letter dated May 23, 2008 and
 17 attached hereto as Exhibit A. Plaintiff's failure to provide proper notice under the CLRA renders her
 18 claims for money damages premature under the CLRA and requires dismissal of those claims with
 19 prejudice against refiling.

20 This motion is based upon this Notice of Motion and Motion, the accompanying Memorandum
 21 of Points and Authorities, all pleadings and papers on file in this action, and upon such other matters
 22 as may be presented to the Court at the time of the hearing.

23 DATED: June 18, 2008

KIRBY NOONAN LANCE & HOGE LLP

25 By: s/David J. Noonan

26 David J. Noonan

27 Andrew L. Colocotronis

28 Attorneys for Defendants American's Collectibles
 Network, Inc. d/b/a Jewelry Television®

1 David J. Noonan (55966)
dnoonan@knlh.com
2 **KIRBY NOONAN LANCE & HOGE LLP**
350 Tenth Avenue, Suite 1300
3 San Diego, California 92101
Telephone (619) 231-8666
4 Facsimile (619) 231-9593

5 Andrew L. Colocotronis
acolocotronis@bakerdonelson.com
6 **BAKER, DONELSON, BEARMAN, CALDWELL**
BERKOWITZ, PC
7 900 South Gay Street, Suite 2200
Knoxville, Tennessee 37902
8 Telephone: (865) 549-7119
Facsimile: (865) 633-7119

9 Attorneys for Defendant Americas Collectibles
10 Network, Inc. d/b/a Jewelry Television®

11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**
13

14 MARLIESE WEED, on behalf of herself and
all others similarly situated

15 Plaintiff,

16 vs.

17 AMERICA'S COLLECTIBLES NETWORK,
18 INC. d/b/a JEWELRY TELEVISION,

19 Defendants.
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CASE NO. 08 CV 0925 WQH (CAB)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
AMERICA'S COLLECTIBLES
NETWORK, INC.'S PARTIAL MOTION
TO DISMISS PURSUANT TO F.R.C.P.
12(b)(C)**

Date: July 21, 2008
Time: 11:00 a.m. PDT
Judge: Hon. William Q. Hayes
Crtrm.: 4

I. INTRODUCTION

This is a putative class action involving statutory and common law claims relating to certain gemstones advertised and sold by America's Collectibles Network, Inc. d/b/a Jewelry Television® ("JTV"). More specifically, Plaintiff Marliese Weed ("Plaintiff"), alleges that gemstones advertised and sold by JTV as rare red and green andesine labradorite, which she purchased, were in fact "low cost or colorless yellow labradorite that ha[d] been given a 'chemical facelift'." Complaint ("Compl."), ¶ 1. Plaintiff's causes of action in her Class Action Complaint include a claim under the California Consumer Legal Remedies Act, Civil Code Section 1750, *et seq.* ("CLRA"). *See* Compl., ¶¶ 46-60. In her Class Action Complaint, and, indeed, even in the prayer for relief, Plaintiff reiterates her unqualified demand for monetary damages, in addition to injunctive relief, arising from JTV's purportedly fraudulent conduct. Compl., Prayer for Relief, ¶ 2. As discussed in detail below, despite clearly seeking monetary damages in the Class Action Complaint, Plaintiff failed to provide JTV with the written notice required by Section 1782(a) of the CLRA of her intent to seek monetary damages prior to filing her Complaint. This Court has repeatedly made it clear that such a failure will result in dismissal of a CLRA claim. Accordingly, Plaintiff's claims for monetary damages under the CLRA should be dismissed with prejudice pursuant to F.R.C.P. 12(b)(6).

II. ARGUMENT

A. The CLRA Requires a Thirty (30) Day Safe Harbor Notice as a Prerequisite to Filing Suit for Damages.

Section 1782(a) of the CLRA provides that prior to the commencement of an action for money damages for violations of the CLRA, notice and an opportunity to cure must be provided to a prospective defendant. Specifically, section 1782(a) provides as follows:

(a) Thirty days or more prior to the commencement of an action for damages pursuant to this title, the consumer shall do the following:

(1) Notify the person alleged to have employed or committed methods, acts, or practices declared unlawful by Section 1770 of the particular alleged violations of Section 1770.

1 (2) Demand that the person correct, repair, replace, or otherwise
2 rectify the goods or services alleged to be in violation of Section
1770.

3 The notice shall be in writing and shall be sent by certified or
4 registered mail, return receipt requested, to the place where the
5 transaction occurred or to the person's principal place of business
within California.

6 Cal. Cons. Legal Rem. Act, section 1782(a), January 1, 2000. Thus, no suit may be maintained under
7 the CLRA for monetary damages unless and until a prospective defendant is provided a thirty (30) day
8 "safe harbor" period to provide an appropriate remedy to the allegedly aggrieved consumer. *Outboard*
9 *Marine Corp. v. Superior Court in and for Sacramento County*, 52 Cal.App.3d 30 (Cal. 1975).

10 On May 23, 2008, Plaintiff filed her Class Action Complaint, in which she specifically
11 sought both injunctive relief and compensatory damages for herself and on behalf of all other
12 similarly situated consumers, Plaintiff served JTV with her purported notice letter under section
13 1782(a) on the same day. *See* Compl. at ¶58 and referenced letter dated May 23, 2008, attached
14 hereto as Exhibit A.

15 In an effort to mask her clear failure to comply with the CLRA's notice provision,
16 Plaintiff claims to be seeking only injunctive relief at this time. She then asserts that she has
17 provided JTV notice pursuant to Section 1782(a) of the CLRA and states she will amend the
18 Complaint to seek monetary damages in the event that JTV fails to take appropriate corrective
19 action. *See* Compl. ¶ 57-58.

20 Plaintiff's disingenuous claim that she is not seeking monetary damages at this time is
21 directly belied by multiple, express allegations set forth in the Complaint. In her very first
22 "Introduction" paragraph, Plaintiff specifically states that "Plaintiff brings this action to recover
23 the money that she and class members spent" on the andesine labradorite. Compl. ¶ 1. Indeed, in
24 her prayer for relief, even before her request for an injunction, Plaintiff prays for "an award of
25 compensatory damages sustained by Plaintiff and all others similarly situated as a result of
26 Defendant's unlawful acts and conduct." Compl., Prayer for Relief, ¶ 2. Certainly Plaintiff
27 cannot be heard to claim that she has not sought monetary damages against JTV through her
28 Complaint. Moreover, any claim by Plaintiff that her specific request for compensatory damages

1 is related exclusively to her Unfair Competition Law or False Advertising Law claims is entirely
2 without merit, as compensatory damages are not a remedy available under either of these causes of
3 action. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1150-51 (Cal. 2003).

4 **B. Plaintiff's Failure to Provide Written Notice Prior to Filing Suit for Damages is Fatal**
5 **to her Claim for Damages.**

6 Plaintiff's failure to provide JTV with requisite notice of her intent to seek money damages
7 prior to filing suit warrants dismissal of Plaintiff's claims for damages with prejudice. Both this
8 Court and the California Supreme Court have consistently affirmed the importance of strict
9 application of the safe harbor provisions of the CLRA as a prerequisite to a suit for monetary
10 damages. In *Outboard Marine*, the Supreme Court of California explained that "the clear intent of
11 the [CLRA] is to provide and facilitate pre-complaint settlement of consumer actions wherever
12 possible and to establish a limited period during which such settlement may be accomplished.
13 *This clear purpose may only be accomplished by a literal application of the notice provisions.*"
14 *Outboard Marine Corp.*, 52 Cal. App.3d at 40-41 (Cal. 1975) (emphasis added).

15 The consistent pronouncements of this Court apply the CLRA in the same way. In an
16 unbroken series of recent cases, this Court has applied *Outboard Marine*, and dismissed plaintiff's
17 claims in the class action context, where the plaintiff failed to strictly comply with the CLRA's
18 notice provisions. *See Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp.2d 939, 950 (S.D.Cal. 2007)
19 (dismissing CLRA claims with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) for failing to provide
20 notice); *Laster v. T-Mobile USA, Inc.*, 407 F. Supp.2d 1181, 1195-96 (S.D. Cal. 2005) (dismissing
21 CLRA damages claims with prejudice for failing to comply with notice provisions); *Von Grabe v.*
22 *Sprint*, 312 F. Supp.2d 1285, 1304 (S.D.Cal. 2003) (dismissing premature claims for monetary
23 damages under the CLRA with prejudice due to failure to provide notice).

24 The recent decision of *Laster v. T-Mobile USA, Inc.*, is particularly noteworthy. In *Laster*,
25 plaintiff sought damages individually and on behalf of all similarly situated customers, for unfair
26 competition, false advertising and violations of the CLRA. Lester alleged that the Defendants
27 charged sales tax to customers on the full retail value of cell phones that were advertised as "free".
28 407 F. Supp.2d at 1183. With respect to the CLRA claims, plaintiff's Complaint sought injunctive

1 relief but also included a request for monetary damages. *Id.* at 1195. Defendants sought dismissal
2 of plaintiff's claim for damages under the CLRA because Plaintiff failed to provide the statutory
3 notice required by section 1782(a). *Id.* In response, plaintiff's counsel asserted that the claim for
4 damages was included through mere inadvertence and sought permission to file an amended
5 complaint striking the request for money damages, so that plaintiff could then comply with the
6 notice provisions of the CLRA. *Id.* at 1195-96. This Court denied this request, ruling that there is
7 "no distinction between inadvertence or willful disregard of the notice requirements...Strict
8 adherence to the statute's notice provision is required to accomplish the Act's goals of expeditious
9 remediation before litigation. Because Plaintiffs failed to provide notice to Defendants pursuant to
10 Section 1782(a), their claim for damages under the CLRA must be dismissed with prejudice." *Id.*
11 at 1196.

12 Significantly, in *Laster*, this Court also found that a plaintiff does not cure deficiencies in a
13 damages claim merely by stating a claim for injunctive relief under the CLRA. Noting that the
14 notice requirements of Section 1782(a) do not apply to actions for injunctive relief, the Court
15 emphasized that a class action for injunctive relief "may not be converted into an action for
16 damages unless the consumer first complies with the notice provisions of Section 1782(a)." *Id.* at
17 1196. Thus, without first providing the requisite notice, a plaintiff may not skirt the notice
18 provisions of the CLRA by filing a complaint for injunctive relief and then amending to seek
19 damages.

20 In the instant matter, Plaintiff's claims for monetary damages under the CLRA are
21 unquestionably subject to dismissal with prejudice due to her clear failure to comply with the
22 notice provisions of the CLRA. Plaintiff simultaneously served JTV with a purported notice letter
23 and a Complaint, wherein she clearly seeks to recover monetary damages. Plaintiff's assertion
24 that she is withholding her claims for damages during the statutory notice period does nothing to
25 diminish her clear request for compensatory damages in her prayer for relief, or her statement in
26 the Complaint that she seeks monetary relief. JTV was clearly denied the requisite safe harbor
27 period provided for under the CLRA and Plaintiff cannot now "unring the bell." As this Court
28 stated in *Cattie*, "[p]ermitting Plaintiff to seek damages first and then later, in the midst of a

lawsuit, give notice and amend would destroy the notice requirement's utility, and undermine the possibility of early settlement." *Cattie*, 504 F. Supp.2d at 950.

Thus, in accordance with the repeated holdings of this Court in the recent decisions of *Cattie*, *Laster*, and *VonGrabe*, JTV respectfully submits that Plaintiff's claim for monetary damages pursuant to the CLRA must be dismissed with prejudice.

III. CONCLUSION

For the reasons set forth herein, America's Collectibles Network, Inc. d/b/a Jewelry Television, pursuant to F.R.C.P. 12(b)(6) respectfully requests that this Court enter an Order dismissing Plaintiff's claims for monetary damages under the California Consumer Legal Remedies Act with prejudice.

DATED: June 18, 2008

KIRBY NOONAN LANCE & HOGE LLP

By: s/David J. Noonan

David J. Noonan

Andrew L. Colocotronis

Attorneys for Defendants American's Collectibles
Network, Inc. d/b/a Jewelry Television®

EXHIBIT A

WEXLER | TORISEVA | WALLACE

Limited Liability Partnership
Chicago, IL • Wheeling, WV • Sacramento, CA

May 23, 2008

VIA CERTIFIED MAIL

America's Collectibles Network, Inc.
d/b/a Jewelry Television
10001 Kingston Pike Street 57
Knoxville, Tennessee 37922

RE: *Notice Under California Consumers Legal Remedies Act, Civil Code Sections 1750, et seq.*

To Whom it May Concern:

In compliance with the requirements of the California Consumers Legal Remedies Act (Civil Code Sections 1750, *et seq.*), ("CLRA") we write on behalf of our client, Marliese Weed, individually and as a representative of all other persons similarly situated.

Over the past few years, Ms. Weed purchased thousands of dollars worth of "andesine labradorite" jewelry from America's Collectibles Network, Inc. d/b/a Jewelry Television ("Jewelry Television"). Jewelry Television, touted by Jewelry Television as being one of the most rare gemstones on the earth, appreciating rapidly, and "100% natural." In reality, we believe that Jewelry Television was marketing, advertising, and selling commonly-occurring feldspars that get their color only as a result of artificial treatment including heating and/or diffusion.

Ms. Weed believes that she and others in her position have purchased a product that has been falsely advertised to them and represented to them as being something it is not: a natural and untreated gemstone. Had Ms. Weed known of the true facts relating to her andesine labradorite jewelry, she would not have purchased it.

Pursuant to California Civil Code Section 1782, you are hereby notified of the following:

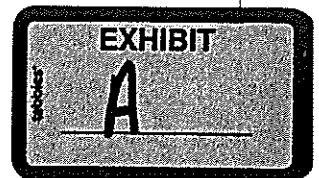
1. Jewelry Television market, advertise, and sell andesine labradorite gems and jewelry to consumers throughout the United States. Through its internet and television advertisements and product materials, Jewelry Television falsely represents the quality, value, nature of the andesine labradorite stones, omitting the fact that their color is derived from an artificial treatment.

Contact Information:

Mark J. Tamblyn
mjt@wtwlaw.com

1610 Arden Way
Suite 290
Sacramento, California
95815

(916) 568-1100
(916) 568-7890 fax
www.wtwlaw.com



WEXLER | TORISEVA | WALLACE

America's Collectibles Network, Inc.
d/b/a Jewelry Television
May 23, 2008
Page 2

2. Jewelry Television's acts constitute violations of Sections 1750, *et seq.* of the Civil Code in that they:

- A. "misrepresent the source, sponsorship, approval, or certification of goods" in violation of §1770(a)(2);
- B. "misrepresent the affiliation, connection, or association with, or certification by, another" in violation of § 1770(a)(3);
- C. "use deceptive representations or designations of geographic origin in connection with goods," in violation of §1770(a)(4);
- D. "represent that goods . . . have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have," in violation of § 1770(a)(5);
- E. represent that goods are of a particular standard, quality or grade when they are of another, in violation of §1770(a)(7);
- F. advertise goods with the intent not to sell them as advertised in violation of §1770(a)(9); and
- G. represent that the transaction was supplied in accordance with a previous representation when it has not, in violation of §1770(a)(14).

As a result, Ms. Weed and all consumers who are similarly situated have been damaged. Under Civil Code section 1782, Jewelry Television is required, within thirty (30) days following receipt of this letter, to correct, repair, replace, or otherwise rectify the goods alleged to be in violation.

Jewelry Television must ensure that (1) all consumers similarly situated have been identified (or, that Jewelry Television has made a reasonable effort to identify all such consumers), (2) that such consumers have been notified that upon their request, Jewelry Television will provide them with an appropriate remedy including, but not limited to, a full refund of their money spent on andesine labradorite jewelry; and (3) that Jewelry Television will within a reasonable time provide such a remedy.

WEXLER | TORISEVA | WALLACE

America's Collectibles Network, Inc.
d/b/a Jewelry Television
May 23, 2008
Page 3

If within thirty (30) days after receipt of this notice, Jewelry Television has not adequately addressed the wrongful conduct described above, Ms. Weed, on behalf of the class, will seek relief in the form of damages and other appropriate relief under California Civil Code Section 1780.

Very truly yours,

WEXLER TORISEVA WALLACE LLP



MARK J. TAMBLIN

MJT/rlf

PROOF OF SERVICE**Weed v. America's Collectibles Network, Inc. dba Jewelry Television**

United States District Court, Southern District of California

Case No. 08 CV 0925 WQH (CAB)

I, the undersigned, declare: That I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am employed in the County of San Diego, California. My business address is 350 Tenth Avenue, Suite 1300, San Diego, California 92101-8700.

On June 18, 2008, at San Diego, California, I served the following document(s) described as **AMERICA'S COLLECTIBLES NETWORK, INC.'S NOTICE OF AND PARTIAL MOTION TO DISMISS PURSUANT TO F.R.C.P. 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AMERICA'S COLLECTIBLES NETWORK, INC.'S PARTIAL MOTION TO DISMISS PURSUANT TO F.R.C.P. 12(b)(6)**, on the parties in said action by placing a true copy thereof in a separate sealed envelope for each addressee named hereafter, addressed to each such addressee respectively as stated on the attached service list, which reflects the address last given by each such addressee on any document filed in the action and served on this office.

SEE ATTACHED LIST

☒ **BY MAIL:** I am readily familiar with our business practice for collecting, processing and mailing correspondence and pleadings with the United States Postal Service. Such correspondence and pleadings are deposited with the United States Postal Service on the same day that they are placed for mailing in the ordinary course of business. I sealed each envelope and, with the postage thereon fully prepaid, placed it for mailing in accord with our business' practice. (C.C.P. § 1013(a) and (b))

☒ **ELECTRONIC TRANSMISSION:** I filed the foregoing document with the Clerk of Court for the United States District Court, Southern District of California, using the Electronic Case Filing ("ECF") system of the Court. The attorney listed above has consented to receive service by electronic means and is registered with the Court's ECF system and was served a "Notice of Electronic Filing" sent by ECF system.

1 I declare under penalty of perjury under the laws of the State of California that the above is
2 true and correct. Executed on June 18, 2008, at San Diego, California.

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SERVICE LIST
Weed v. America's Collectibles Network, Inc.
Case No. 08-CV-0925 WQH CAB

Mark J. Tamblyn Attorneys for Plaintiff
email: mjt@wtwlaw.com
WEXLER TORISEVA WALLACE LLP
1610 Arden Way, Suite 290
Sacramento, California 95815
Telephone: (916) 568-1100
Facsimile: (916) 568-7890

Gregory F. Coleman Attorneys for Plaintiff
COLEMAN & EDWARDS, P.C.
4800 Old Kingston Pike, Suite 120
Knoxville, Tennessee 37919
Telephone: (865) 247-0080
Facsimile: (865) 247-0081

Kenneth A. Wexler Attorneys for Plaintiff
Edward A. Wallace
Amber M. Nesbitt
WEXLER TORISEVA WALLACE LLP
55 W. Monroe Street, Suite 3300
Chicago, IL 60603
Telephone: (312) 346-2222
Facsimile: (312) 346-0022